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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1998

MEMBER SERVICES LIFE INSURANCE COMPANY, doing business as MEMBER SERVICE ADMINISTRATORS, as Third Party Administrator of the LIBERTY GLASS COMPANY ERISA QUALIFIED EMPLOYEE BENEFIT PLAN,

Petitioner,

v.

AMERICAN NATIONAL BANK & TRUST COMPANY OF SAPULPA, as Guardian of William Brooks Balthis, Debra Leanne Balthis and David Douglas Balthis; E. TERRILL CORLEY; THOMAS F. GANEM; STEPHEN R. CLARK; and BRADFORD J. WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Certiorari should be granted to resolve a division among the circuit courts as to whether welfare benefits vest under an ERISA welfare benefit plan absent explicit plan language that provides for vesting of such benefits.

LIST OF PARTIES, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The petitioner and respondents are named in the caption. Petitioner Member Services Life Insurance Company is wholly owned by Group Health Services of Oklahoma, Inc., which does business under the trade name of Blue Cross and Blue Shield of Oklahoma.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition was issued on December 15, 1997, and is published in Federal Third Reporter at 130 F.3d 950 (10th Cir. 1997). It is reprinted in Appendix A hereto ("App. A") at page A-1. The order of the United States District Court for the Northern District of Oklahoma that gave rise to the appeal was issued on April 2, 1996, and is reprinted in Appendix B hereto ("App. B") at page B-1. The order by the Tenth Circuit denying rehearing and suggestion for rehearing en banc was issued January 21, 1998, and is reprinted in Appendix C hereto at C-1.

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion in this case on December 15, 1997. On January 21, 1998, the Tenth Circuit denied Petitioner's timely-filed Motion

for Rehearing and Suggestion for Rehearing en banc. Pursuant to Supreme Court Rule 13, this petition has been filed within ninety (90) days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(1) through § 1132(a)(3), provides:

§1132. Civil Enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary

(A) for the relief provided for in subsection (c) of this section, or to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; -

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1051(1) provides as follows:

Part 2 - Participation and Vesting

§1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than-

(1) an employee welfare benefit plan;

The rest of Part 2 delineates the elaborate vesting requirements for ERISA pension plans.

STATEMENT OF THE CASE

Member Services Life Insurance Company, doing business as Member Service Administrators (MSA), as Third Party Administrator of the Liberty Glass Company ERISA Qualified Employee Benefit Plan (the "Plan"), brought this ERISA civil enforcement action in the United States District Court for the

Northern District of Oklahoma. Jurisdiction was based on 28 U.S.C. § 1331. MSA sought a declaratory judgment that it was entitled to reimbursement of benefits paid by the Plan. The Plan paid benefits in the amount of $570,368.75 to American National Bank and Trust Company of Sapulpa (ANB), as guardian to beneficiaries under the Plan. The beneficiaries were injured in a 1988 fire which resulted in a lawsuit against BIC Corporation and a judgment paid to ANB on July 28, 1994 of over nineteen million dollars.

On January 1, 1993, prior to payment of the judgment, the Plan was amended, pursuant to proper plan amendment procedure, allowing the Plan to be reimbursed from money received from third-party tortfeasors or wrongdoers responsible for beneficiaries' injuries, and providing that future medical expenses be first paid from such a settlement, award, judgment or payment. The Plan has never contained language providing for the vesting of any benefits.

The parties filed motions for summary judgment based on stipulated facts, and on April 2, 1996, the District Court entered

an order determining that MSA was entitled to recoup the medical expenses paid and had no obligation to pay future medical expenses unless and until the proceeds of the tort judgment had been exhausted. App. B. ANB appealed and on December 15, 1997, the Tenth Circuit reversed that portion of the district court's declaratory judgment that MSA was entitled to recoup benefits paid prior to the enactment of the amendment. App. A. The Court broadly held that employee welfare benefits automatically vest when performance is due under a welfare benefit plan. App. A at A-18; 130 F.3d at 956.

ARGUMENT

ERISA recognizes two types of employee benefit plans: pension plans and welfare plans. In general, welfare plans provide "medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . ." 29 U.S.C. § 1002(1). Pension plans provide retirement income to employees or a deferral of income by employees extending to the termination of employment or beyond. 29 U.S.C. § 1002(2)(A). The plan at issue in the instant case is a welfare

benefit plan.

The law of welfare benefit plan vesting is a morass of contradictions. On the one hand, the law is seemingly clear that benefits provided under a welfare benefit plan need never vest, and only do so where there is clear and express language in the ERISA plan that provides for vesting. See, e.g., Chiles v. Ceridian Corp., 95 F.3d 1505, 1510, 1513 (10th Cir. 1996); Gable v. Sweetheart Cup Co., 35 F.3d 851, 855 (4th Cir. 1994) cert. denied 514 U.S. 1057 (1995); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir.) cert. denied 510 U.S. 870 (1993).

On the other hand, this Petitioner's survey of pertinent cases around the country reveals that numerous court decisions have misinterpreted or ignored the above-stated principles as applied to individual cases. See, e.g., Wheeler v. Dynamic Engineering, Inc., 62 F.3d 634 (4th Cir. 1995); UAW v. Yardman, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983) cert. denied 465 U.S. 1007 (1984); Bidlack v. Wheelabrator Corp., 993 F.2d 603, 608-09 (7th Cir.) (en banc) cert. denied 510 U.S. 909 (1993).

Many courts have simply felt free to distort the law,

fashioning automatic vesting contrary to the intent of Congress. Conflicts among the courts abound.[1]

Part of the confusion in this area of the law may come from associating ERISA welfare plans with ERISA pension plans. But while Congress included elaborate vesting requirements for ERISA pension plans, it purposely did not require vesting in ERISA welfare benefit plans. Wise, 986 F.2d at 934-35. In that regard, the committees of both the House and Senate explained that the term "accrued benefit"

> refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

H.R. Rep. No. 807, 93rd Cong., 2d Sess. 60, reprinted in 1974

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[1] The division between the Tenth Circuit panel in Chiles, which required clear and express language in the ERISA welfare plan before a finding of vesting, and the panel in the instant case, which did not, only underscores the conflict that has arisen around the country.

U.S. Code Cong. & Ad. News 4639, 4670, 4726; S. Rep. No. 383, 93rd Cong., 1st Sess. 51, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4890, 4935. The Second Circuit in Moore v. Metropolitan Life Insurance Co., 856 F.2d 488 (2d Cir. 1988) provided further insight:

> With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs. . . [automatic vesting] would not only fly in the face of ERISA's plain language, but would also decrease protection for future employees and retirees.

Id. at 492. The Eleventh Circuit put it this way:

> Congress did not require employee welfare benefit plans to be chiseled in stone. . . Congress' express intent [was] that employers be free to fashion medical benefit plans as costs, technology, and the marketplace dictate.

Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993).

In Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990), the Third Circuit discussed additional concerns, including the desire not to deter employers from even providing welfare benefit plans for their employees:

> ERISA's participation and vesting requirements . . . squarely address the problem of how much to limit an employer's power to withdraw previously offered benefits . . . None of these provisions apply to welfare plans, however, which are exempted from all of ERISA's participation and vesting requirements . . . Having made a fundamental decision not to require employers to provide any benefit plans, Congress was forced to balance its desire to regulate extant plans more extensively against the danger that increased regulation would deter employers from creating such plans in the first place. . . . ERISA . . . was also designed to "minimize" the "adverse impact" of "cost increases" imposed on employers by the tougher regulation, H.R. Rep. No. 533, 93rd Cong., 1st Sess. 1, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4639. Thus, Congress analyzed "all of the provisions in [ERISA] . . . on the basis of their projected costs in relation to the anticipated benefit to the employee participant." Id., 1974 U.S. Code Cong. & Admin. News at 4639-40. . . .

Id. at 1160.

In a different but related context, this very Court recently discussed the subject of Congress' intent regarding welfare benefit

plan vesting, offering new insight into the reasoning underlying Congress' intent:

> The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that "requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." S. Rep. No. 93-383, p. 51 (1973). Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "they would err initially on the side of omission." Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995).

Inter-modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co., ___ U.S. ___, 117 S.Ct. 1513, 1516 (1997).

Against this backdrop, courts around the country have been bombarded with a dizzying array of lawsuits by disabled or ill plaintiffs who perhaps mistakenly thought their benefits were "chiseled in stone." Some courts stood fast to the principles laid down by Congress; unfortunately, others have begun tinkering with ERISA to suit the perceived needs of individual cases. There have been a myriad of circuit court cases with differing views regarding

the automatic vesting of welfare plan benefits. The following cases serve only as examples.

Wheeler v. Dynamic Engineering, Inc., 62 F.3d 634 (4th Cir. 1995) is a case where a court decided to carve out an exception to the no-automatic-vesting rule for welfare benefit plans. In Wheeler, a plan beneficiary had begun the first step of a four-step cancer therapy (high dose chemotherapy with peripheral stem cell rescue or HDC/PSCR). Though there was no language in the plan to provide for such, the Court nevertheless held that coverage for the entire procedure vested when the first step of the procedure began. Id. at 639.

In contrast are the AIDS cases McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), cert. denied 506 U.S. 981 (1992) and Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993). In these cases, the welfare benefit plans massively reduced the caps on their benefits for AIDS and AIDS-related illnesses, from $1,000,000, to $5,000 and $25,000 respectively, after their employees became ill and began receiving treatment.

The Fifth Circuit and Eleventh Circuit held that because

welfare benefit plans neither vest nor accrue, it was legal for the Plans to withdraw hundreds of thousands of dollars worth of benefits from already ill and dying AIDS patients. See, e.g., Owens, 984 F.2d at 398. This, the Courts held, was in accordance with Congress' express intent to protect future employees and retirees by allowing employers and plan sponsors the freedom to fashion and amend medical benefit plans as costs, technology, and the marketplace dictate. See, e.g., Owens, 984 F.2d at 400.

The Court in Wheeler tried to distinguish its ruling in light of the above-cited AIDS cases by emphasizing the finite nature of the HDC/PSCR cancer treatment in comparison to the unforeseeable course of treatment for AIDS. Wheeler, 62 F.3d at 640. However, the so-called "meaningful distinction" offered by the Fourth Circuit is irrelevant, as it does nothing to negate Congress' conspicuous decision not to vest welfare benefits absent explicit language that provides for vesting in the welfare benefit plan.

A case more similar to Wheeler but with a different result is Meester v. IASD Health Services Corp., 963 F.2d 194 (8th Cir. 1992). In Meester, the treatment begun was also specific and finite in nature: a year-long inpatient treatment for mental health and substance abuse problems. However, the Eighth Circuit rejected the plaintiff's argument that coverage vested when treatment began, recognizing that welfare benefit plans do not vest absent an explicit expression of contrary intent by the employer. Id. at 197. The Court accordingly allowed the Plan's withdrawal of coverage for the already-begun treatment.

The courts have also been faced with a multitude of cases where beneficiaries claimed they were entitled to various welfare benefits for life once they reached retirement. Some circuit court decisions held fast to the principle that a plan must contain clear and express language indicating a benefit is nonforfeitable, see, e.g., In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896, 902 (3d Cir. 1995); Gable, 35 F.3d at 855 (4th Cir.); Chiles, 95 F.3d at 1515 (10th Cir.); Wise, 986 F.2d at 937 (5th Cir.).

Other circuit court decisions lost sight of that principle, see, e.g., UAW v. Yard-man, Inc., 716 F.2d at 1482; Bidlack v. Wheelabrator Corp., 993 F.2d at 608-09. It is no secret that the circuits disagree when it comes to the vesting of such benefits. See American Federation of Grain Millers, AFL-CIO v. International Multifoods Corp., 116 F.3d 976, 980 (2d Cir. 1997).

In the instant case, the Tenth Circuit took a broad turn for the worse in the ever-expanding but unauthorized field of non-statutory, non-Plan, court-created vesting of ERISA welfare benefits. The Plan was properly amended,[2] and the amendment allowed it to recover money it paid for medical benefits out of the proceeds of the beneficiaries' huge tort judgment, simply and equitably preventing the beneficiaries from recovering twice for the cost of medical expenses. But the Court went out of its way to broadly hold that welfare benefits automatically vest any time

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[2] It is significant that all parties conceded, and both the trial and circuit courts found, that the disputed plan amendment was lawful and effective as to all benefits paid after the date of amendment. The only dispute concerned the effect of the amendment on the right of the plan to recover so-called "vested" benefits paid prior to the date of amendment.

performance is due, thereafter giving the beneficiary an "unencumbered" right to benefits. App. A at A-20; 130 F.3d at 957.

To fully understand the mischief of this holding (and the others like it), a brief review of the concept of vesting, the repercussions of vesting, and the relative intent of Congress in this regard are in order.

Vested benefits are benefits that are nonforfeitable. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 376 (1980). To vest benefits is to render them "forever unalterable." Sprague v. General Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998). Due to this unalterable nature of vesting, it must not be inferred lightly. Id.

Because there is no vesting of welfare benefits provided under ERISA, vesting can only be found from the language of the plan documents. Id. Due to the narrow nature of vesting in the welfare benefit plan context, and the serious ramifications of rendering benefits forever unalterable, vesting can only be found from "strong prohibitory or granting language" in the plan. Wise

v. El Paso Natural Gas Co., 986 F.2d at 938. Such language must be both clear and express. Chiles v. Ceridian Corp., 95 F.3d at 1513.

These principles have been espoused by numerous circuit courts. After all, that was the intent of Congress. Unfortunately, some circuits have failed to follow through on Congress' intent, and paid lip service only to the above-stated ideals. But Congress specifically analyzed the long term effects of welfare plan vesting. Congress conducted research and heard testimony. After careful consideration, Congress came to realize that any automatic vesting "would seriously complicate the administration and increase the cost" of such plans. H.R. Rep. No. 807, 93rd Cong., 2d Sess. 60, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4670, 4726; S. Rep. No. 383, 93rd Cong., 1st Sess. 51, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4890, 4935. MSA submits Congress came to the correct conclusion.

The Tenth Circuit's holding in the instant case would inevitably complicate the administration and increase the cost of welfare benefit plans. Where there is unalterable, nonforfeitable

vesting of benefits any time a welfare benefit plan provides for some type of performance, the bookkeeping and administrative costs alone could be staggering. Under such a construction, different plan participants or beneficiaries could achieve their individual vested rights at different times and under different versions of the plan as amended over time; keeping track of who has an "unencumbered" right and when they have it would be a nightmare. Clearly, such would only encourage employers to forego providing welfare benefits to their employees. Complicating the management of ERISA welfare plans by establishing "unencumbered" rights to benefits is what Congress sought to avoid.

The word that encapsulates the intent of Congress, that appears over and over again regarding the intent of Congress, is "flexibility." Congress contemplated that welfare benefit plans will be amended over time. Flexibility was a paramount concern. The instant case presents a wonderful example of what Congress intended in that regard. The plan beneficiaries received a tort judgment of over nineteen million dollars for their injuries, and the

plan amendment only permitted reimbursement of payments out of that fund. In eliminating the beneficiaries' double recovery, the Plan was just exerting its flexibility granted by Congress to reduce costs as conditions change, protecting future employees and retirees. The Tenth Circuit, by embellishing ERISA with different levels of vesting, and creating artificial and automatic vesting requirements, has undermined that flexibility.

The conflict that has arisen around the country is that some courts have felt free to add obligations to ERISA welfare benefit plans where there should be none. As the Fifth Circuit stated in Wise,

> Congress has conspicuously chosen to exempt welfare benefit plans . . . [w]e do not have the power to assume the legislator's role and welcome additional layers of obligations. . . judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme.

Id. at 934-35. But this is what various circuit courts have done. ERISA welfare benefit plans should only vest where there is explicit language, clear and express, providing for vesting. Some courts have held to the contrary. The conflict is of such import

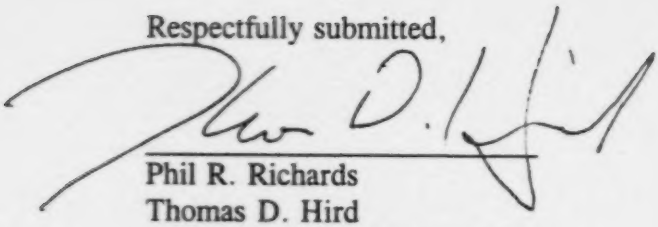
that this Court should grant certiorari to address these issues and correct the errors committed by the Tenth Circuit in the instant case.

Whether changes in ERISA welfare benefit law should be made is perhaps worthy of debate. Cogent arguments can surely be made on both sides. But it is Congress, not the courts, that should make any changes. As the Court in Wise went on to say,

> Across the nation, companies faced with rapidly rising costs and worried about their competitiveness are paring . . . benefits that were once considered sacrosanct. But ERISA simply does not grant employees unfettered rights to the corporate treasury. Employers need not abandon prudent business behavior when marketplace forces compel them to rethink earlier offers of contingent, non-vested benefits. In light of today's spiraling health care costs, cutbacks in government-sponsored health care coverage (Medicare), and our ever-aging population, Congress may enact changes. But the current ERISA requires no more.

Id. at 934-37. This subject is ripe for review by this Court. Certiorari should be granted accordingly.

Respectfully submitted,



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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MEMBER SERVICES LIFE INSURANCE COMPANY, doing business as MEMBER SERVICE ADMINISTRATORS, as Third Party Administrator of the LIBERTY GLASS COMPANY ERISA QUALIFIED EMPLOYEE BENEFIT PLAN, Plaintiff-Appellee, v. AMERICAN NATIONAL BANK AND TRUST COMPANY OF SAPULPA, as guardian of William Brooks Balthis, Debra Leanna Balthis, and David Douglas Balthis, Defendant-Appellant, and E. TERRILL CORLEY, THOMAS F. GANEM, STEVEN R. CLARK, BRADFORD J. WILLIAMS, and WALTER M. JONES, Defendants-Appellees.	)	F I L E D United States Court of Appeals Tenth Circuit DEC 15 1997 PATRICK FISHER Clerk Nos. 96-5122 96-5183

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. CIV-95-27-H)

Sam T. Allen IV of Loeffler, Allen & Ham, Sapulpa, Oklahoma (Sam T. Allen III with him on the briefs), for Defendant-Appellant.

E. Terrill Corley of Corley & Ganem, Tulsa, Oklahoma (Thomas F. Ganem with him on the brief for Defendants-Appellees), for Defendants-Appellees.

Phil R. Richards of Richards, Paul & Richards, Tulsa, Oklahoma, (Thomas D. Hird with him on the brief), for Plaintiff-Appellee.

Before **SEYMOUR**, Chief Judge, **EBEL** and **BRISCOE**, Circuit Judges.

SEYMOUR, Chief Judge.

Member Services Life Insurance Company, doing business as Member Services Administrators (MSA), brought this action under section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(3), and federal common law to recover payments it made under an ERISA welfare benefit plan to American National Bank and Trust Company of Sapulpa (ANB), the guardian of minor children who were beneficiaries of the plan. MSA claimed the right to recoupment based on the contract as well as on principles of unjust enrichment, restitution, and equitable subrogation. The district court granted summary judgment for MSA, ruling that it was entitled to recovery under an amendment to the plan providing for subrogation. ANB appeals and we reverse.

I

The underlying facts are undisputed. MSA administers a self-funded ERISA welfare benefit plan established by the Liberty Glass Company. Jeff Balthis, the father of the minor children for whom ANB is the guardian, is an employee of Liberty Glass and his minor children are beneficiaries under the plan. In February

1988, the minor children suffered severe injuries in a fire caused by a BIC lighter, and the plan thereafter paid $570,368.75 in medical expenses incurred by the children. At the time these benefits were paid, the plan did not contain a provision permitting the recoupment of benefits from funds obtained by a beneficiary from a third party tortfeasor. Although the plan from its inception had provisions permitting it to be amended or modified, it had no provision addressing whether such amendments could be given retroactive effect. In October 1988, the plan was amended to add a provision giving MSA a right of recoupment if a beneficiary received money from a negligent third party as a result of injuries for which the plan had paid benefits. The amendment provided that it was retroactively effective as of March 1, 1988.

ANB as guardian of the minor children brought an action against the BIC Corporation on April 1, 1990, alleging that BIC was liable under the doctrine of product liability for the injuries to the children. ANB was represented in its suit against BIC by E. Terrill Corley, Thomas F. Ganem, Stephen R. Clark, and Bradford Williams (the attorneys) pursuant to a court-approved

attorney fee contract under which the attorneys were to receive a fee of fifty percent of all amounts collected after the deduction of case expenses. While the lawsuit was pending, MSA made a demand under the 1988 amendment for reimbursement of the medical expenses MSA paid on behalf of the children from any judgment or settlement in the suit. The attorneys rejected the claim, pointing out that the amendment upon which MSA relied allowed recoupment from a recovery based on negligence, and the claim against BIC was based only on the theory of product liability. A judgment was entered against BIC on October 26, 1992, for actual and punitive damages, and ANB ultimately recovered $19 million on behalf of the minor children. BIC was held liable solely on the basis of product liability and was specifically found not to have been negligent.

On January 1, 1993, the 1988 amendment was modified to authorize recoupment of any monies received by a beneficiary from a third-party tortfeasor held liable under *any* theory of law or equity. This amendment required that such funds be held in trust until paid in satisfaction of the plan's right of recoupment, and

further provided that the amendment was retroactively effective as of August 1, 1987, the date of the plan's inception. Contemporaneously with the payment of the judgment by BIC, $570,368.75 was placed into escrow pending a determination of MSA's ability to enforce its right of recoupment under the 1993 amendment.

MSA brought the instant action against both ANB and the attorneys to recover the funds placed in escrow, as well as interest and attorneys fees expended in obtaining the funds. Defendants responded that the plan, as a contract between the parties, could not be retroactively amended to deprive the minor children of benefits. As an alternative counterclaim, defendant attorneys asserted that if MSA were awarded the escrowed funds, the attorneys were entitled to fifty percent in accordance with their fee contract. Although MSA recognized that the fee agreement between the attorneys and ANB could generate a claim by the attorneys to some or all of the escrow funds, MSA asserted that its claim was superior to that of both ANB and the attorneys and that it was therefore entitled to the entire amount. MSA also sought an

adjudication that the minor children were not entitled to the payment of future benefits from the plan until each child's expenses equaled the amount of the judgment awarded to that child.

The district court ruled in favor of MSA, holding that the 1993 amendment could be applied retroactively to enable MSA to recoup payments paid to the beneficiaries before the amendment was enacted. The court also ruled that MSA's obligation to pay future benefits on behalf of each child would not arise until that child had exhausted the amount of his or her judgment.[1] Finally, the court held that the attorneys were entitled to receive a fee in connection with the escrowed funds. Although the court observed that "if the attorneys had been unsuccessful in prosecuting the state court lawsuit, [MSA] would not receive any recoupment

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[1] ANB concedes that the 1993 amendment applies to those medical benefits that would otherwise have been paid by the plan after the date the amendment was enacted. Accordingly, any expenses incurred after that date must be paid out of the children's judgments until those judgments are exhausted. We are concerned in this opinion only with recoupment of those benefits paid by the plan before enactment of the 1993 amendment.

whatsoever," the court nonetheless held that "[t]o the extent that the payment of the attorneys' fees decreases the escrowed amount available for recoupment, [MSA] will be entitled to recoupment from the portion of the judgment not currently held in escrow." Supp.App. of Atty. Aplees. at 182-83. The court's ruling in effect relieved MSA from the obligation to pay any attorneys fees and placed the entire fee responsibility on ANB, as the court subsequently held in a supplemental order. Thus, the court awarded fees to defendant attorneys against their own co-defendant client even though the attorneys had asserted no claim against their client by way of a cross-claim or otherwise.

On appeal, ANB and the attorneys assert the court erroneously applied the 1993 amendment retroactively to allow MSA to recover expenses it had paid prior to adoption of the amendment. ANB alternatively raises several challenges to the district court's ruling that the attorneys fee award must be paid out of funds not held in escrow. ANB argues in essence that this ruling granted the attorneys relief they did not request against their own client, whom they did not sue. Specifically, ANB contends

the entry of this judgment violated its due process rights, was based upon a misreading of the fee agreement, and deprived it of its right to a jury trial. The attorneys argue alternatively that if MSA prevails, MSA should share in the payment of the attorneys fees for services rendered on its behalf and with its knowledge and approval. We hold the district court erred in determining that the 1993 amendment could be applied retroactively to allow recoupment of benefits already paid, and we therefore need not consider the propriety of the fee ruling.[2]

II

ERISA regulates two types of benefit plans, pension benefit plans that create vested rights and welfare benefit plans that need not create vested rights. See Chiles v. Ceridian Corp., 95 F.3d 1505, 1510 (10th Cir. 1996). The plan at issue here is a welfare benefit plan. As such it is "exempt from the statutory vesting requirements that ERISA imposes on pension benefits. Accordingly, an employer may amend the terms of a welfare

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[2] ANB concedes that if the children are entitled to the funds in escrow, the attorneys will receive 50% of the amount as their fee.

benefit plan or terminate it entirely." Wheeler v. Dynamic Eng'g, Inc., 62 F.3d 634, 637 (4th Cir. 1995) (citations omitted).

"However, benefits under a welfare benefit plan may vest under the terms of the plan itself." Id. at 637-38. Because, as MSA agrees, an amendment to any ERISA plan may not operate retroactively if that amendment deprives a beneficiary of a vested benefit, see Chiles, 95 F.3d at 1510; Wheeler, 62 F.3d at 640, we must ascertain whether the medical benefits here were vested at the time MSA sought to recoup them under the 1993 amendment. In making this assessment, we apply "the principles of contract interpretation." Chiles, 95 F.3d at 1515. We are also guided by the Supreme Court's admonition that "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) (internal quotations and citations omitted). In general,

> [c]overage under a medical insurance policy or plan is normally triggered by one of two events. If a policy insures against illness, coverage for all medical costs arising from a particular illness vests when the illness occurs. If policy insures against

> expenses, coverage vests when the expenses are incurred.

Wheeler, 62 F.3d at 638 (citation omitted). We need not determine whether the plan here vests coverage on the basis of illness or on the basis of expenses. Even adopting the construction most favorable to MSA and construing the plan as vesting coverage at the time expenses are incurred, the medical expenses MSA seeks to recoup were incurred and paid, and therefore vested, before the plan was modified by the 1993 amendment. Accordingly, retroactive application of the amendment in these circumstances would impermissibly destroy vested rights.

The cases relied on by the district court are distinguishable because none of them approved the retroactive application of an amendment to allow a plan to recover benefits that had vested through payment. In Dyce v. Salaried Employees' Pension Plan, 15 F.3d 163 (11th Cir. 1994), for example, beneficiaries of a pension benefit plan sought early retirement benefits based on the claim that the merger of their company with another terminated their employment with the old company and resulted in their automatic retirement even though they remained employed by the

new company. Their claims were administratively denied on the basis of an amendment formally adopted after the merger that made participants ineligible for early retirement benefits as long as they were employed by the surviving company. Id. at 164. The court held that under the plain language of the plan, the merger did not result in the automatic retirement of these employees because the plan required them to "elect to retire," which none of them had done. Id. at 166. As the court pointed out, the employees were free both before and after the merger to elect early retirement and receive benefits under the plan. The court concluded that the amendment was properly applied retroactively because it did not deprive the employees of a benefit to which they were otherwise entitled. Id. Although the facts in Dyce are too dissimilar to the instant case to be particularly helpful, we find it significant that the retroactive application of the amendment there did not take away benefits that had already been paid.

Electro-Mechanical Corp. v. Ogan, 9 F.3d 445 (6th Cir. 1993), did involve facts somewhat analogous to those before us. In Ogan, the beneficiary was born in July 1986 with severe

disabilities. In August 1987, a medical malpractice suit was brought on his behalf and was settled for over $1,000,000. At the time of the beneficiary's birth, the plan in effect did not contain a subrogation clause authorizing the recovery of benefits in the event the beneficiary recovered from a third person. Before settlement was reached, a new plan providing the right of subrogation was adopted in 1988. The court upheld enforcement of the clause. Id. at 447. Significantly, however, when the district court opinion in Ogan is read in conjunction with the circuit court opinion, it is clear that the plan sought to recover only those benefits paid *after* the subrogation clause was adopted.[3] Likewise in Owens v. Storehouse, Inc., 984 F.2d 394, 397 (11th Cir. 1993), although the plan at issue was modified to cap benefits for an illness that the

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[3] The circuit court opinion states that the plan sought reimbursement of medical expenses paid on behalf of the beneficiary in the amount of $139,783.70. Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 447 & n.2 (6th Cir. 1993). The district court opinion states that the plan had paid the same amount, $139,783.70, as medical expenses from August 22, 1988, the date on which the subrogation clause was added, to the date of the court's ruling. See Electro-Mechanical Corp. v. Ogan, 820 F.Supp. 346, 348 (E.D. Tenn. 1992).

beneficiary had previously contracted and for which the plan had already paid benefits, the plan applied the cap prospectively only and did not seek to recoup benefits already paid.

Indeed, we have found no case in which a court has allowed retroactive recoupment under circumstances similar to those present here. To the contrary, courts, including this one, have in a variety of contexts rejected attempts to apply plan modifications retroactively to affect benefits that had already become due. In Filipowicz v. American Stores Benefit Plans, 56 F.3d 807 (7th Cir. 1995), the court refused to give retroactive effect to a life insurance plan modification that would have taken away benefits owed on the insured's death. The court acknowledged that the plan was a welfare benefit plan not subject to vesting requirements under ERISA, but nonetheless held that because the right to the insurance benefits vested at the insured's death under general insurance law, "[a] later modification, even one which is retroactive, can have no effect on a beneficiary's claim to benefits." Id. at 815. The court rejected the plan's argument that it could "retroactively modify a life insurance policy

after the insured's death so as to take away the life insurance proceeds due a beneficiary at the date of the insured's death." Id. The court applied insurance contract principles to determine that the claim had vested and accordingly held, as we do, that a subsequent modification could not be applied to those vested benefits.

Similarly, in Bartlett v. Marietta Operations Support, Life Ins., 38 F.3d 514 (10th Cir. 1994), we considered whether a summary plan description redefining eligibility for life insurance benefits applied when the insured had elected coverage and had died before the summary had been distributed or made available to him. We held that the district court had "properly decided to disregard the subsequent language of the summary plan description because it was not printed or made available to employees until after [the insured's] death. The court reasoned that [the insured], through his beneficiary, could not be bound to terms of the policy of which he had no notice." Id. at 517. We agreed with

> the district court's conclusion that the language had no effect because it had not been published and distributed until after [the insured's] death. Subsequent modifications to the plan, through the

> drafting of the summary plan description, do not effect the terms of the written plan in existence when the [beneficiary's] claim arose.

Id.

In Confer v. Custom Eng'g Co., 952 F.2d 41 (3d Cir. 1991) (per curiam), the court addressed the effect of an oral announcement excluding motorcycle accidents from coverage under a welfare benefits plan. The beneficiary sought coverage for a motorcycle accident that had occurred after the oral announcement but before a written amendment had been executed and backdated to an effective date prior to the accident. Id. at 42-43. The court held that the oral announcement was not effective and that the formal written amendment operated prospectively only. Id. at 43.

Finally, we view as instructive the court's discussion in McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991). There an employee was a beneficiary under a welfare benefits plan that originally provided for lifetime medical benefits of $1,000,000. The employee contracted AIDS and informed his employer. The plan was thereafter amended to provide a lifetime maximum limitation of $5000 on benefits payable for AIDS-related

claims. The employee brought an action asserting that the amendment violated section 510 of ERISA, 29 U.S.C. § 1140, which prohibits interference with protected rights. Id. at 403. The court rejected this argument, holding that section 510 protected only rights "to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer." Id. at 405. The court pointed out that the plan never guaranteed the *continued* availability of the original $1,000,000 limit. While the $1,000,000 limit was in effect, the employee had been fully reimbursed for all claimed expenses incurred. Moreover, after the date of the amendment imposing the $5,000 limit on AIDS-related claims, the employee had been reimbursed for up to $5,000 of all such expenses. Thus, the employer had at all times honored the existing, enforceable obligations it had assumed. Id. at 405 & n.5.

The results in the above opinions rest on two interrelated principles relevant to contract law and to ERISA claims in particular. The notion of protecting vested rights prevents one party to a contract from unilaterally changing the terms of

performance after that performance has become due. While it is true that benefits need never vest prospectively under an ERISA welfare benefit plan, the above cases and general principles of insurance contract law hold that such benefits do vest when performance is due under the contract. At that point, the contract is no longer executory and must be performed in accordance with the terms then in existence.

The second and related principle underlying the above cases is that of notice. As we stated in Bartlett, a beneficiary can "not be bound to terms of the policy of which he had no notice." 38 F.3d at 517. "[O]ne of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995). This goal is implemented by a scheme "built around reliance on the face of written plan documents." Id.

> The basis of that scheme is another of ERISA's core functional requirements, that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." In the words of the key congressional report, "[a] written plan is to be required in order that every employee may, on examining the plan documents,

> determine exactly what his rights and obligations are under the plan."

Id. (citations omitted).

In order to effectuate reliance upon written plan documents, ERISA requires plan administrators to furnish beneficiaries with summaries of new amendments no later than 210 days after the end of the plan year in which the amendment is adopted. See 29 U.S.C. § 1024(b)(1). This automatic notice requirement does not, as MSA suggests, authorize a plan administrator to apply an amendment retroactively under the circumstances present here. As the Supreme Court pointed out in Curtiss-Wright,

> independent of any information automatically distributed to beneficiaries [under section 1024(b)(1)], ERISA requires that every plan administrator make available for inspection in the administrator's "principle office" and other designated locations a set of all currently operative, governing plan documents, see § 1024(b)(2), which necessarily includes any new, bona fide amendments. As indicated earlier, plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents and thus an independent incentive for obtaining new amendments as quickly as possible and for weeding out defective ones.

514 U.S. at 84 (emphasis added) (citation omitted). Because plan administrators have an obligation imposed by ERISA to operate the plan according to current plan documents, a post hoc amendment clearly cannot alter a plan provision in effect at the time performance under the plan became due.

MSA argues, and the district court agreed, that allowing recoupment here would not deprive the beneficiaries of benefits to which they were otherwise entitled because they received payment of their medical expenses when they were due and would simply be repaying them out of their judgments. As our discussion makes clear, however, this argument is fundamentally flawed in several respects. At the time MSA was required to perform under the plan, the plan documents then in existence not only provided the beneficiaries the right to payment of their medical expenses, it did so unencumbered by any duty to reimburse MSA. Allowing retroactive application of the 1993 amendment here would therefore deprive the beneficiaries of the unencumbered right to which they were entitled at the time of performance. Moreover, allowing recoupment on the basis of a later amendment would bind

the beneficiaries to a contract provision of which they had no notice when performance was due, contrary to our holding in Bartlett, and would violate the duty imposed on MSA by ERISA to operate the plan in accordance with the plan provisions currently in force. Accordingly, we hold that the 1993 amendment may not be applied retroactively to permit MSA to recoup payments made before the amendment was enacted.

III

MSA also contends it is entitled to recoupment as a matter of equity, asking this court to exercise its equitable powers to prevent unjust enrichment. The courts are in some disarray on the circumstances in which the doctrine of unjust enrichment may be invoked with respect to claims arising under ERISA. See, e.g., Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 992-93 (4th Cir 1990) (discussing cases). We have concluded that "the weight of authority supports the application of federal common law to ERISA disputes." Resolution Trust Corp. v. Financial Insts. Retirement Fund, 71 F.3d 1553, 1556 (10th Cir. 1995). In so doing, however, we cautioned that "'the power [of

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the federal courts] to develop common law pursuant to ERISA does not give carte blanche power to rewrite the legislation to satisfy [the court's] proclivities.' Instead, the courts must continue to implement the policies of ERISA." Id. (citation omitted).

We begin our consideration of the propriety of equitable relief by pointing out the hornbook rule that quasi-contractual remedies such as those MSA seeks are not to be created when an enforceable express contract regulates the relations of the parties with respect to the disputed issue. See 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.20, at 64-65 (rev. ed. 1993). Courts have recognized this principle and have stated their unwillingness to resort to the doctrine of unjust enrichment to override a contractual plan provision. See, e.g., Singer v. Black & Decker Corp., 964 F.2d 1449, 1452 (4th Cir. 1992); Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383, 390 (7th Cir. 1986); Van Orman v. American Ins. Co., 680 F.2d 301, 312 (3d Cir. 1982). Concomitantly, courts have held that enrichment is not unjust when authorized by an express provision of the plan. See Ryan v. Federal Express Corp., 78 F.3d 123, 127 (3d Cir.

1996); Cummings, 797 F.2d at 390. Finally, courts have resorted to equitable federal common law principles only when to do so "would be consistent with ERISA's scheme and further its purposes." Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 280 (2d Cir. 1992); see also Ryan, 78 F.3d at 126 (application of federal common law to ERISA claim appropriate only when necessary to effectuate the statutory pattern); Singer, 964 F.2d at 1451 (same).

These principles unequivocally indicate that consideration of the unjust enrichment doctrine would not be proper here. At the time the benefits at issue were paid by the plan, the beneficiaries had a contractual right to payment unburdened by any right to subrogation or recoupment. Application of the doctrine would therefore override an express contractual provision. Moreover, as we have noted, ERISA requires plan administrators to operate the plan in accordance with the current plan documents. Allowing recoupment on the basis of an amendment not contained in the documents at the time of performance would be directly contrary to this statutory duty. Moreover, as one court has

pointed out, "ERISA says nothing about subrogation provisions. ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content." Ryan, 78 F.3d at 127. Resort to common law is thus not necessary to secure a statutory policy, because ERISA embodies no policy on the matter. Recourse to federal common law is improper when it would be used to rewrite ERISA rather than to implement its policies. Id. at 126; Financial Insts. Retirement Fund, 71 F.3d at 1556; Diduck, 974 F.2d at 281. We therefore reject MSA's argument that we apply federal common law to impose a right of recoupment under the circumstances here.

We **REVERSE** the judgment of the district court granting MSA a right to recoup the medical expenses it paid on behalf of the minor children, and **REMAND** the case for further proceedings in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MEMBER SERVICES LIFE INSURANCE COMPANY, doing business as MEMBER SERVICE ADMINISTRATORS, as third party administrator of the LIBERTY GLASS COMPANY ERISA QUALIFIED EMPLOYEE BENEFIT PLAN,	)	
Plaintiff,	)	
v.	)	Case No. 95-CV-27-H
AMERICAN NATIONAL BANK & TRUST COMPANY OF SAPULPA, as Guardian of William Brooks Balthis, Debra Leanne Balthis, and David D. Balthis; E. TERRILL CORLEY; THOMAS F. GANEM; STEVEN R. CLARK; BRADFORD J. WILLIAMS; and WALTER M. JONES,	)	
Defendants.	)	

ORDER

This matter comes before the Court on a Motion for Summary Judgment by Plaintiff Member Services Life Insurance Company, doing business as Member Service Administrators ("MSA") (Docket #6) and a Motion for Summary Judgment by

Defendants American National Bank & Trust Company of Sapulpa ("American"), E. Terrill Corley, Thomas F. Ganem, Stephen R. Clark, Bradford J. Williams (collectively, the "Defendants") (Docket #7).[1]

In the complaint, MSA seeks a declaratory judgment that MSA is entitled to reimbursement for benefits paid by the Liberty Glass Company's ERISA Qualified Employee Benefit Plan (the "Plan"). Alternatively, MSA seeks reimbursement under the equitable doctrine of restitution. Both Plaintiff and Defendants move for summary judgment on all issues.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett,

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[1] Defendant Walter M. Jones, who is pro se, filed a disclaimer of "any right, title or interest in or to the funds which are the subject of this litigation" on April 26, 1995. Accordingly, although Plaintiff has not yet dismissed him, he has failed to move for summary judgment or to join in Defendants' pending motion. Because this is a declaratory judgment action and the funds which are the subject of this action are being held in escrow, Mr. Jones is entitled to be dismissed from the case as he does not claim an interest in any part of these funds. The Court hereby dismisses Defendant Jones from this lawsuit without prejudice.

477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed.R. Civ.P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed.R.Civ.P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review,

the court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II.

All parties believe that summary judgment is appropriate in this case. In considering the instant motions, the Court accepts as true the facts set forth in the joint statement of stipulated facts filed by the parties on August 31, 1995. The facts are as follows:

1. On or about the 1st day of August, 1987, Liberty Glass established a self-funded ERISA Qualified Employee Benefit Plan (the "Plan") providing specified welfare benefits to its employees and their beneficiaries, as defined with the Plan and regulated by ERISA, 29 U.S.C. §1001 et seq.

2. MSA, as Third Party Administrator of this Plan, is responsible for administering claims submitted to the Plan and determining eligibility for benefits under the Plan. MSA is thus a Plan fiduciary.

3. Jeff Balthis, the father of minor children Williams Brooks Balthis, Debra Leanne Balthis, and David Douglas Balthis

(the "Balthis children") was employed by Liberty Glass at all times pertinent to the claims set forth by MSA, and as a result the Balthis children are beneficiaries under the Plan.

4. On February 2, 1988, the Balthis children suffered severe injuries in a fire caused by a defective BIC lighter, and the Plan thereafter paid $570,368.75 for medical expenses incurred in the treatment of the Balthis children for injuries sustained in the fire.

5. At the time the Balthis children suffered their injuries, the Plan had no provision relating to or providing for any right of recoupment of Plan benefits from any recovery the Plan beneficiaries might receive from third party tortfeasors or wrongdoers.

6. Defendant American National Bank & Trust Company of Sapulpa was appointed guardian of the Balthis children and commenced an action against BIC Corporation in the District Court of Creek County, Oklahoma, alleging the BIC Corporation was liable under the doctrine of manufacturers'

products liability for the injuries to the minor children and resulting damages.

7. The Plan was amended on October 21, 1988, to include a provision under which the Plan could recoup, from Plan beneficiaries, any money received by the beneficiaries from a negligent third party (or such party's insurance carrier) that was responsible for the beneficiaries' injuries and for which the Plan paid benefits. The Plan amendment provided that it was retroactively effective as of March 1, 1988.

8. During the lawsuit and before the date of judgment, demand was made on behalf of the Plan against Defendant American National Bank & Trust Company of Sapulpa (the "guardian"), and BIC Corporation, for reimbursement out of the proceeds of any settlement or judgment of the amount expended by the Plan for medical treatment rendered to the minor children.

9. On October 26, 1992, judgment was rendered against BIC and in favor of American as guardian for the Balthis children for actual and punitive damages. American recovered on

the grounds of products liability, and the trial court specifically determined an absence of negligence on the part of BIC. See American Nat'l Bank & Trust Co. of Sapulpa v. BIC Corp., 880 P.2d 420 (Okl.Ct.App. 1993). After remittitur ordered by the appellate court, BIC paid in excess of $19 million in satisfaction of the judgment.

10. On January 1, 1993, the Plan provision regarding recoupment was amended. The 1993 Plan amendment provided that it was retroactively effective as of August 1, 1987, the date of the inception of the Plan. The 1993 amendment included a provision under which the Plan could recoup from Plan beneficiaries any money received from a third party tortfeasor or wrongdoer who was responsible for injuries sustained by Plan beneficiaries under any theory of law or equity and for which the Plan had paid benefits, together with all costs (including attorney's fees) incurred by the Plan in asserting and protecting its right of recoupment, and requiring that any such funds received by a beneficiary be held in trust for the Plan until paid over in satisfaction of the Plan's right of recoupment.

11. Contemporaneous with the payment of the judgment by BIC Corporation, $570,368.75 was placed into escrow pending a determination of MSA's right to the funds paid by the Plan for medical expenses of the minor children.

12. Since the inception of the Plan, it has included a provision entitled "Right of Recovery", which provides:

> Whenever payments have been made by the Administrator for Covered Services in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, irrespective of to whom paid, the Administrator shall have the right to recover the excess from among the following, as the Administrator shall determine any person, to or for whom such payments were made, any insurance company, or any other organization...

13. The January 1, 1993 amendment includes language that requires the guardian to pay costs of future medical expenses of the minor children from the proceeds of the tort judgment, before seeking further benefits from the Plan, until the amount of those expenses equals the amount of the guardian's judgment, less that amount paid the plan under its recoupment provision.

14. The January 1, 1993 amendment contained language providing that the Plan is entitled to recover its attorneys

fees and costs in enforcing its right of recoupment, as well as interest on the funds received by a Plan beneficiary, but not paid to the Plan, at 18% per annum.

15. The Plan, from its inception in 1987, has contained provisions which allow amendment or modification of the Plan, but did not have any provision which allowed or disallowed a Plan amendment or modification to be given retroactive effect.

In support of their joint statement of stipulated facts, the Parties submitted that following for the Court's consideration: the Original Plan adopted August 1, 1987 (including the Administrative Services Agreement), the 1988 Amendment, and the 1993 Amendment.

III.

Because the parties have stipulated as to the material facts, the only issue remaining for the Court is to determine which party is entitled to judgment as a matter of law. The parties acknowledge that the Plan did not provide a right of recoupment at the time of the Balthis children's accident, such that the Plan would be permitted to recoup benefits paid to the children in the

event of a subsequent judgment. Plaintiff argues that the amendment does not operate to deprive the children of any benefits. Instead, it only provides for a right of recoupment in the event beneficiaries receive a judgment from a third party tortfeasor that caused the injuries. Alternately, Plaintiff argues that it is entitled to reimbursement under equitable principles.

On the other hand, Defendants assert that Plaintiff is applying the amendment retroactively -- and therefore unlawfully-- because the injuries had occurred and the Plan had paid certain of the children's medical expenses ($525,987.64), prior to the enactment of the amendment. Defendants assert that only expenses incurred and paid after January 1, 1993 should be subject to the Plan's right of recoupment.[2]

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[2] Defendants do not argue that the January 1, 1993 amendment was not made according to the terms of the Plan and in writing. Thus, they effectively admit that the amendment was otherwise lawful and that, therefore, it may be applied prospectively. Plaintiff is entitled to recoup funds in the amount of $49,505.92 (medical benefits paid by the Plan on behalf of the Balthis children from January 1, 1993 to September 15, 1995).

Further, the January 1, 1993 amendment states that:

The Court's decision turns on whether this amendment, which allows the Plan to recoup from Plan beneficiaries any money received from a third party tortfeasor who was responsible

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> [i]n the event that any such settlement, award, judgment or payment received by a Covered Person resulted, in whole or in part, from a claim or allegation that such Covered Person would incur future medical expenses from any injury, illness or condition for which the Plan has paid Benefits, the Plan shall have no further obligation to pay any Benefits for such injury, illness or condition from the date of receipt of such settlement, award, judgment or payment until the sum of all eligible expenses paid as the result of such injury, illness or condition from and after the date of receipt of such settlement, award, judgment or payment remaining after first deducting all funds paid to the Plan pursuant to its right of recoupment and all costs of recovering such payment incurred by the Covered Person, (including without limitation attorneys' fees actually earned under the terms of a contract of employment with the attorney for the Covered Person).

Therefore, because the judgment received by the children resulted in part from an allegation that would they incur future medical expenses, the Plan does not need to pay any further future medical expenses incurred by the children unless and until the proceeds of the judgment have been exhausted. The Court notes that the children received a general verdict in the product liability lawsuit and, thus, it is impossible for this Court to establish what amount, if any, was intended to be designated for future medical expenses.

for injuries sustained by Plan beneficiaries and for which the Plan had paid benefits, may be applied retroactively under the circumstances presented by this case.[3]

The general rule is that an amendment to an ERISA plan may not operate retroactively, if that amendment deprives plan participants of a benefit to which they would otherwise be entitled. Dyce v. Salaried Employees' Pension Plan of Allied Corp., 15 F.3d 163, 166 (11th Cir. 1994); accord Wheeler v. Dynamic Eng'g, Inc., 62 F.3d 634, 640 (4th Cir. 1995) (plan amendment adopted after plaintiff began multi-step chemotherapy treatment for Stage IV breast cancer would not operate to deny plaintiff coverage to which she was otherwise entitled to under unamended plan); Confer v. Custom Eng'g Co, 952 F.2d 41, 43 (3d Cir. 1991) (affirming district court's determination that medical expenses stemming from Plaintiff's injuries in motorcycle accident were covered by ERISA plan where written amendment to plan executed

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[3] Neither Plaintiff nor Defendants have identified any controlling Tenth Circuit authority. Therefore, the Court, in its exercise of federal question jurisdiction, will look to other federal courts to assist it in resolving this issue.

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after Plaintiff's accident with an effective date prior to Plaintiff's accident purporting to exclude coverage for motorcycle accidents would have deprived Plaintiff of a benefit to which he was otherwise entitled); but see Vasseur v. Halliburton Co., 950 F.2d 1002, 1007 (5th Cir. 1992) ("The plan's subrogation rights depend on the provisions of the particular plan then in effect when expenses were incurred or claims were paid.").

In Dyce, appellants claimed that they were entitled to payment of early retirement benefits under an ERISA pension plan after their employer, Ignition Products Corporation ("Ignition"), merged into Unison Industries Limited Partnership ("Unison") on January 6, 1989. Although appellants continued their employment without interruption after the merger at Unison, they argued that, under the definition of "retirement" in the plan in existence on the date of the merger, the merger terminated their employment with Ignition and that, therefore, they were entitled to immediate early retirement benefits. In response, the plan pointed to an amendment executed on August 9, 1989, and made retroactively effective as of January 6, 1989, which amendment made plan

participants ineligible for immediate payment of early retirement benefits as long as they were employed by Unison. 15 F.3d at 164.

Principally, appellants contended that the plan could not apply the August 9, 1989 amendment retroactively so as to deny them early retirement benefits because the effect would be to deprive them of benefits to which they would otherwise be entitled. In analyzing their claim, the court stated:

> [i]n this case, the benefits to which the appellants are entitled have not been reduced or eliminated. Every participant who was eligible to retire and receive benefits before the divestiture date was still eligible for those same benefits after the merger. The timing of the receipt of benefits is entirely up to each participant, based on when she elects to retire. The appellants take the position that retirement is self-executing. To the contrary, the plain language of the Plan requires that a participant "elect to retire." Prior to the merger a participant could have elected to retire and immediately begun to receive early retirement benefits. After the merger and the effective date of the amendment, the same choice was available to each appellant.

Dyce, 15 F.3d at 165-66; accord Pratt v. Petroleum Prod. Mgmt., Inc. Employee Savs. Plan & Trust, 920 F.2d 651, 660 (10th Cir. 1990) (amendments to pension plan allowing interim valuation of

employee's vested interest in employer contribution account may not be retroactively applied as they would deny benefits to employee to which he was otherwise entitled). The Dyce court held that, "[i]n this case, retroactive application of the § 23 amendment does not deprive participants of a benefit to which they would otherwise be entitled. Therefore, we conclude that the amendment was properly applied retroactively to January 6, 1989." Id. at 166; cf. Confer, 952 F.2d at 42-43 (applying amendment excluding motorcycle accidents from plan coverage retroactively would deny plaintiff benefits to which he was otherwise entitled).[4]

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[4] Defendants believe that Bartlett v. Martin Marietta Operations Support, Inc. Life Ins. Plan, 38 F.3d 514, 517 (10th Cir. 1994), which stands for the proposition that "[s]ubsequent modifications to the plan, through the drafting of the summary plan description, do not effect the terms of the written plan in existence when the plaintiff's claim arose," supports their claim that any retroactive amendment to a plan is unenforceable. However, while the Bartlett court refused to include language published and distributed after the death of Plaintiff in its interpretation of the terms of the plan at the time of Plaintiff's death, the plan administrator in Bartlett did not purport to give the additional language retroactive effect. Thus, the question of whether a certain amendment may operate retroactively was not before the Bartlett court.

Further, the facts of Bartlett are distinguishable from the instant case. First, although Bartlett discusses an employee

Unlike the circumstances in Confer, where the retroactive amendment actually denied benefits to a plan beneficiary, the instant case is more akin to the analysis and reasoning of the Dyce court.

The Court agrees with Plaintiff, that upholding the application of the January 1, 1993 amendment, which provides for a right of recoupment, would not deprive the Balthis children of any benefits to which they were otherwise entitled. Under the

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welfare benefit plan, the subject matter of the lawsuit is proceeds of a life insurance policy. General insurance law provides that "a beneficiary's right to insurance proceeds vests on the date of the insured's death." Filipowicz v. American Stores Benefit Plans Committee, 56 F.3d 807, 815 (7th Cir. 1995). Therefore, the retroactive application of a modification in the plan which would deprive the beneficiary of her right to proceeds after the proceeds have vested would, by definition, deprive the beneficiary of benefits to which she was otherwise entitled. Cf. Williams v. Cordis Corp., 30 F.3d 1429, 1432 (11th Cir. 1994) (a pension plan is a unilateral contract which creates a vested right in those employees who accept the offer; "[t]hus, when a vested employee is terminated, a pension plan is ordinarily required to determine benefits in accordance with the plan then in effect."). However, unlike pension plans, the benefits received pursuant to an employee welfare benefit plan generally neither vest nor accrue. Owens v. Storehouse, Inc., 984 F.2d 394, 397-98 (11th Cir. 1993). Second, in Bartlett, the additional language did not clearly add or delete a term of the plan but rather clarified the definition of which employees were eligible for benefits. Therefore, Bartlett does not control the Court's disposition of the instant case.

heading entitled "Benefits To Which Subscribers Are Entitled", the Plan provides that "[t]he liability of the Plan is limited to the Benefits for Covered Services specified in this Contract." Plan at 45, § GP, ¶ B(1). The Plan defines "Benefits" as "the payment, reimbursement, and indemnification of any kind which a Subscriber will receive from and through the Plan." Plan at 3, § DE, ¶2. Therefore, under the Plan, the children were entitled to receive payment or reimbursement for certain medical services specified in the Contract. It is undisputed that the children received those Benefits. Rather than depriving the children of the payment or reimbursement received for those covered services, the January 1, 1993 amendment allows the Plan to recover the amount of money paid for those benefits out of the proceeds of a tort judgment recovered by the children. Accord Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 447 (6th Cir. 1993) (affirming, on other grounds, district court decision requiring beneficiary to reimburse plan from proceeds of medical malpractice settlement pursuant to a subrogation clause which was given effect retroactively). The amendment prevents the Balthis children from

recovering twice for the cost of their medical expenses. Further, if the children had not recovered a tort judgment against the party responsible for their injuries, the Plan would have had no right to recoup its payment of Benefits under the Plan. Thus, unlike the amendment considered by the Confer court, which denied coverage to a plan beneficiary for injuries received in a motorcycle accident subsequent to the occurrence of the accident, this amendment does not deprive the children of any benefits to which they are otherwise entitled under the Plan.[5]

The January 1, 1993 amendment further provides that the Plan may recoup all costs incurred in asserting and protecting its rights of recoupment including without limitation reasonable attorneys' fees. Therefore, Plaintiff is directed to submit to the Court a detailed accounting of its costs and attorneys' fees incurred

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[5] Because the Court holds that the right of recoupment amendment may be applied here under the specific and limited circumstances of this case, where the application of such an amendment does not deprive a beneficiary of benefits which he or she would otherwise receive, it is unnecessary for the Court to address Plaintiff's second argument, that it is entitled to restitution under an equitable theory.

so that the Court may determine how much Plaintiff is entitled to recover under this provision.

IV.

Finally, Defendants assert that, if Plaintiff is entitled to recoup any portion of the escrowed amount, then Defendants are entitled to recover their attorneys' fees first from that amount pursuant to their Contract with the American National Bank and Trust Company of Sapulpa as Guardian of William Brooks Balthis, Debra Leanne Balthis and David Balthis. The court-approved Contract provides that, as their fee for prosecuting the action against BIC, E. Terrill Corley, Thomas F. Ganem, Steve Clark, and Brad Williams, the attorneys, "shall have and receive FIFTY PERCENT (50%) of all amounts collected from said claim after deduction of case expenses." The escrowed funds are simply a portion of the judgment collected and received as a result of their successful prosecution of the claim against BIC pursuant to the Contract.

Plaintiff has not presented the Court with any authority enabling it to change the provisions of the Contract. Clearly, the

attorneys are entitled to their fee consisting of fifty percent of the entire judgment amount prior to any recoupment of the funds by Plaintiff. Indeed, if the attorneys had been unsuccessful in prosecuting the state court lawsuit, Plaintiff would not receive any recoupment whatsoever. To the extent that the payment of the attorneys' fees decreases the escrowed amount available for recoupment, Plaintiff will be entitled to recoupment from the portion of the judgment not currently held in escrow.

In conclusion, the Court grants Plaintiff's Motion for Summary Judgment (Docket # 6). The Court denies Defendants' Motion for Summary Judgment (Docket # 7). Finally, the Court dismisses the remaining Defendant, Walter M. Jones, from the lawsuit.

IT IS SO ORDERED.

This 2nd day of April, 1996.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEMBER SERVICES LIFE INSURANCE COMPANY, doing business as MEMBER SERVICE ADMINISTRATORS, as Third Party Administrator of the LIBERTY GLASS COMPANY ERISA QUALIFIED EMPLOYEE BENEFIT PLAN,	)	
Plaintiffs-Appellees,	)	
v.	)	
AMERICAN NATIONAL BANK AND TRUST COMPANY OF SAPULPA, as guardian of William Brooks Balthis, Debra Leanna Balthis and David Douglas Balthis,	)	Nos. 96-5122 96-5183
Defendants-Appellants,	)	
and	)	
E. TERRILL CORLEY, THOMAS F. GANEM, STEVEN R. CLARK, BRADFORD J. WILLIAMS, and WALTER M. JONES,	)	
Defendants-Appellees.	)	

ORDER

Filed January 21, 1998

Before **SEYMOUR**, Chief Judge, **EBEL** and **BRISCOE**, Circuit Judges.

Appellees' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Trish Osgood
Deputy Clerk